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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1959

No. 640

LENA S. TILLMAN, Administratrix of the Estate of James A. Tillman, Deceased, 160 Remington Place, New Rochelle, New York,

Petitioner,

vs.

ROBERT B. ANDERSON, Secretary of the Treasury, Department of the Treasury, Washington, D. C.

and

PEARL CARTER PACE, Chairman, THOMAS W. S. DAVIS, Commissioner, and ROBERT L. KUNZIG, Commissioner, of the Foreign Claims Settlement Commission of the United States, Tariff Commission Building, Washington, D. C.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OCTOBER TERM, 1958

No. .....

LENA S. TILLMAN, Administratrix of the Estate of James A. Tillman, Deceased, 160 Remington Place, New Rochelle, New York,

Petitioner,

vs.

ROBERT B. ANDERSON, Secretary of the Treasury, Department of the Treasury, Washington, D. C.

and

PEARL CARTER PACE, Chairman, THOMAS W. S. DAVIS, Commissioner, and ROBERT L. KUNZIG, Commissioner, of the Foreign Claims Settlement Commission of the United States, Tariff Commission Building, Washington, D. C.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Lena S. Tillman, Administratrix of the Estate of James A. Tillman, deceased, respectfully re-

quests that a writ of certiorari issue to review the orders dismissing the appeal on motion of respondents and denying a reconsideration entered in the above entitled case on October 30 and December 11, 1959 (App. 37, 42), which affirmed the summary judgment order of the District Court for the District of Columbia (R. 59) dismissing the complaint.

Opinions Below

The opinion of the Court of Appeals has not been officially reported but is printed in the appendix herein (App. 43). There was no opinion in the District Court.

Jurisdiction

The order of the Court of Appeals dismissing the appeal on motion of the respondents was entered on October 30, 1959 and reconsideration denied on December 11, 1959 (App. 37, 42). The jurisdiction of this court is invoked under 28 U. S. C., Section 1254(1).

The jurisdiction of the Court of Appeals was invoked under 28 U. S. C., Section 1291.

The jurisdiction of the District Court was invoked under U. S. C. 5, Section 1009, and 28 U. S. C., Sections 1331, 2201 and 2202, and Rule 57 of the Federal Rules of Civil Procedure.

Questions Presented

1. Whether the Court of Appeals has power under Rule of Civil Procedure 73 to dismiss *on the merits* an appeal seasonably and regularly taken without argument and the reply brief, thereby discriminating between appellants in regard to the right of proper presentation of the appeal, and ignoring due process and practice by other Courts of Appeal.

2. Whether the District Court for the District of Columbia or the United States Court of Claims has jurisdiction of this cause, which arises from the Act of Congress of August 9, 1955 (22 U. S. C., Sec. 1621, *et seq.*), purporting to put in effect some of the provisions of the Roosevelt-Litvinov Agreement and Assignment of November 16, 1933 in the light of 28 U. S. C., Section 1502, which denies jurisdiction to the Court of Claims over a claim "growing out of or dependent upon any treaty entered into with foreign nations."

3. Whether petitioner is entitled to just compensation for property subject to her liens taken by the U. S. Government under the provisions of the Roosevelt-Litvinov Agreement of November 16, 1933, and thereafter held for distribution to other American nationals under the provisions of Sections 302 and 305 of the Act of August 9, 1955 (Secs. 1641a and 1641d; Title 22, U. S. C., 69 Stat. 571, 572).

4. Whether Fifth Amendment to U. S. Constitution of the United States prohibits U. S. Government, acting through Congress or respondent Foreign Claims Settlement Commission, from taking property subject to petitioner's liens not for public uses but for the benefit of other American citizens.

5. Whether Congress can vest judicial functions in an administrative agency by conferring upon it the power to review State judgments, in the light of Articles II and III of U. S. Constitution, providing for the separation of executive and judicial functions of the Government, and of the Full Faith and Credit clause of Article IV thereof.

6. Whether Congress has the power to deprive Federal Courts of the right and duty to consider and prohibit violations of U. S. Constitution by administrative agencies of the Government.

7. Whether aforementioned Section 305 of the Act of August 9, 1955 (Sec. 1641d, Title 22, U. S. C.) is unconstitutional insofar as it is claimed by respondents that it authorized said Foreign Claims Settlement Commission to review grounds and merits of the judgment and the attachment writ granted to petitioner's decedent by the New York Supreme Court.

Statement

1. James A. Tillman, an American citizen from 1916 until his death in 1950, brought suit in the Supreme Court of the State of New York against the Russo-Asiatic Bank, a Russian corporation, to recover $188,408.00, and on August 22, 1927 procured a warrant of attachment in that amount from that Court, and on August 24, 1927 levied under it against the Guaranty Trust Company and the National City Bank of New York, which at that time were indebted to said Russo-Asiatic Bank in a sum in excess of $4,000,000 (R. 4).

2. After much litigation in the State and Federal courts, where the action was removed, Tillman finally recovered, on remand, in the Supreme Court of New York, judgment against Russo-Asiatic Bank on September 23, 1935 for $210,675.05 (R. 5-19-21).

3. In 1935, the Supreme Court of New York appointed receivers over the Russo-Asiatic Bank, and in 1953 the receivers paid to the petitioner $10,000.00 as her aliquot share of the funds collected by them, pursuant to New York statute permitting payment only to creditors with *valid attachments* (R. 7-9).

Under New York law, a warrant of attachment is not annulled by a judgment, but remains alive until dissolved by order of the court, or is paid (*Ackerman* v. *Tobin*, 22 F. 2d 541, 544).

4. On November 16, 1933, the President of the United States recognized the Soviet Government of Russia, and in this connection the so-called Litvinov Assignment was executed, by which the Soviet Government assigned to the United States all claims which the Soviet Government owned in the United States, preparatory to final settlement of the claims outstanding between the two Governments, and of the claims of their nationals. (*Establishment of Diplomatic Relations with the Union of Soviet Socialist Republics*, Publication 528, Department of State, 1948 (Reprinted) (R. 6, 7, 28). As the Soviet Government had theretofore nationalized the Russian banks, it owned or claimed to own deposits carried for the accounts of such banks in the United States, including the deposits held in the Guaranty Trust Company and in the National City Bank of New York for the account of the Russo-Asiatic Bank.

On August 4, 1939, Congress adopted a Joint Resolution appointing a Commissioner for Soviet Claims in the Department of State (53 Stat. 1199), whose functions by the Reorganization Plan No. 1 of 1954 were transferred to respondent Commission (R. 7, 28). Subsequently, in accordance with the Litvinov Assignment, U. S. Government undertook to collect the various amounts so assigned to it, including deposits for Russo-Asiatic Bank. In some instances, litigation was necessary. *Steingut, et al.* v. *Guaranty Trust Company*, 58 F. Supp. 623, affirmed 161 F. 2d 571, C. C. A. 2d, (1947); *First National City Bank of New York* v. *Gilliland*, 103 U. S. App. D. C. 219, 257 F. 2d 223, certiorari denied 79 S. Ct. 61. By 1955, the United States had collected approximately $9,000,000 under the Assignment, including, concededly, $4,368,000.00 of the funds of Russo-Asiatic Bank (R. 9, 29), theretofore held on deposit with said New York banks, and placed the funds in the Treasury on special account (R. 9, 28).

Under Section 302 of the Public Law 285, approved August 9, 1955 (69 Stat. 571; 22 U. S. C. 1641a), a Soviet

Claims Fund so-called was created in the Treasury for coverage into it of funds collected under the Assignment, and by Section 305 of that Public Law the above Commission was directed to receive and determine in accordance with substantive law, including applicable international law, for certification to the Treasury for payment, the validity and amounts of claims of American nationals against the Soviet fund. Two kinds of claims were to be considered, the first comprising claims against the Soviet Government arising prior to November 16, 1933, and the second, claims against Russian nationals whose property in the United States was theretofore attached or against which judgments were obtained by American citizens in American Courts.

5. On March 22, 1956, petitioner, as Administratrix, filed claim with respondent Commission for the sum of $200,497.20, predicated on rights derived from said attachment of August 22, 1927, and levy made thereunder on August 24, 1927 (R. 11, 16, 18), and also derived from said judgment and execution thereof upon the deposits with the Guaranty Trust Company and the First National City Bank of New York (R. 11, 24, 25).

In subsequent hearings before the Commission, petitioner contended that in granting the judgment, the Supreme Court of New York had determined both the validity and amount of her claim, and that such determination was binding on the Commission under constitutional guarantees. However, the Commission held that Section 305(a)(1) of the Public Law entitled it to review the proof and evidence submitted to the New York Supreme Court to obtain the attachment to determine how Tillman's underlying claims were acquired, and accordingly, on November 14, 1956, denied the claim on the ground that it had not been established that the underlying claims had originally accrued to him, although Tillman was unquestionably the original owner of the attachment lien.

In January, 1957 (R. 12, 29, 30), the Commission finally dismissed the claim based on the aforementioned attachment and judgment liens (R. 28-29).

In rejecting the claim, the Commission purported to exercise powers with regard to Tillman's attachment and judgment liens, denied to Congress and to the Commission as an administrative agency, in that

> (a) The Commission claimed the right and authority to examine and review the underlying considerations of the judgment and attachment writ, such action being contrary to Articles II and III of the Constitution of the United States providing for separation of the executive and judicial functions;
>
> (b) The Commission refused to accord Full Faith and Credit to the final judgment of the Supreme Court of New York, as required by Section 1, Article IV, of the Constitution of the United States;
>
> (c) The Commission freed the assets of Russo-Asiatic Bank from the liens to Tillman which had been impressed upon them through the attachment and judgment of the Supreme Court of New York, thereby taking property without just compensation, contrary to Amendment V of the Constitution of the United States; and
>
> (d) The Commission applied assets of Russo-Asiatic Bank, so confiscated from Tillman, not for any public purposes but for payment to other private individuals, also contrary to Amendment V.

6. Both sides moved for summary judgment in the District Court because none of the facts were in dispute, and all the documents relating to the matter were attached to the complaint. (R. 16-21). The District Court granted judgment to respondents and denied judgment to the petitioner on the ground that it had no jurisdiction, because this action should have been brought in the Court of Claims, and

because Congress in enacting the Act of August 9, 1955, expressly legislated that the decisions of the respondent Commission cannot be reviewed either on questions of fact or of law. Of course, the confiscation of the petitioner's lien by the Treasury Department had no relation whatever to the Act of August 9, 1955, relating solely to the Commission, or to anything done by it under said Act (R. 49).

The Circuit Court of Appeals, on a motion for the respondents, summarily affirmed the judgment of District Court on the merits without an opinion (App. 37), and then, on an application for reconsideration, cited its own decisions, holding that no constitutional questions were properly raised by the appellants therein and that it is without power to consider any other error of the Commission. Thus, the Court of Appeals denied the petitioner the right to argue her appeal on the merits, as provided in U. S. C. 28, Chapter 3, Section 46(c); ignored the question of jurisdiction between the District Court and the Court of Claims; the confiscation of petitioner's liens as violating her constitutional rights under the Fifth Amendment of U. S. Constitution; and the assertion of power by the Commission under Section 305 of the Act of August 9, 1955 to review the merits of the attachment and judgment liens granted to petitioner by the New York Supreme Court as contravening the Full Faith and Credit provisions of Article IV and Articles II and III of the U. S. Constitution, providing for the separation of executive and judicial functions of the Government.

Errors of the Court of Appeals

1. It had no power to dismiss summarily by motion, petitioner's appeal regularly and seasonably taken, *on the merits* in violation of U. S. C. 28, Chapter 3, Section 46(c), and Section 1291, and Rule 73 of Civil Procedure, and its own court rule 19(a). It also created conflict with other

circuits in interpreting said Rule 73 (*Seeman* v. *United States*, 90 F. 2d 88 (Fifth Circuit); *U. S.* v. *Nudelman*, 207 Fed. 2d 109 (Third Circuit)).

2. It erroneously held that Congress has power to deprive Federal Courts of the right and duty to determine violations of the United States Constitution by federal administrative agencies by holding the Commission has power to question the validity of the judgment and the warrant of attachment granted by the New York Supreme Court in determining the amount and the ownership of Tillman's claims against the Russo-Asiatic Bank, thereby fixed.

3. It failed to determine irrespective of the Act of August 9, 1955 and the acts of the Commission thereunder the confiscation by the Treasury Department of Tillman's attachment and judgment liens which were lawfully acquired in New York against the debts due to the Russo-Asiatic Bank, and the application by the Department of these debts not to public use but to payment of private claims of other American citizens against the Soviet Government.

4. It failed to determine the constitutionality of Section 305 of the Act of August 9, 1955, in so far as it allegedly empowered the Commission to review on the merits the acts of the New York Supreme Court in granting attachment and judgment liens to Tillman in the light of Articles II and III of U. S. Constitution, providing for the separation of executive and judicial functions of the Government, and as contravening the Full Faith and Credit provision of Article IV hereof.

5. It failed to determine the effect of the Statute of Limitations on Tillman's claim in the light of the fact that Congress created by the Act of August 9, 1955 a special fund in the U. S. Treasury to cover payment of moneys

due on attachments of American citizens, and that it limited such attachments to those who were procured prior to November 15, 1933, viz.: those that were 22 years old at the time of the enactment of said statute, thereby waiving normal statutory limitations.

REASONS FOR GRANTING THE WRIT

The Court of Appeals had no power to dismiss on the merits, by motion, petitioner's appeal, a disposition contrary to Rule 73 of Civil Procedure and in conflict with practice of other Federal Courts of Appeals.

The petitioner, in bringing her appeal to the Court of Appeals for the District of Columbia Circuit, scrupulously complied with all the requirements as to time and procedure. Respondents agreed with petitioner on a joint appendix, and petitioner printed and seasonably filed her brief and the joint appendix. Thereafter, respondents moved to dismiss the appeal on the merits for lack of a meritorious issue (App. 29). Petitioner filed objections (App. 32-36). On October 30, the Court of Appeals, by an order made in chambers, granted the motion and affirmed the judgment of the District Court (App. 37).

The jurisdiction of the Circuit Court of Appeals is statutory (U. S. C., Sec. 1291). It confers a statutory right upon a litigant to appeal from the judgment of the Distrit Court. U. S. C. 28, Chapter 3, Section 46(c) provides that "Cases and controversies *shall be heard* and determined by a court or division of not more than three judges * * *." Rule 73 of Civil Procedure provides:

> "Failure of the Appelant to take any of * * * steps to secure the review * * * is ground for such action as the appellate court deems appropriate, which may include dismissal of appeals."

This rule was formulated in accordance with the decision of this Court in *Amory* v. *Amory*, 91 U. S. 356, at 357, where Chief Justice Waite delivered the unanimous opinion of the Court, saying at page 357:

> "*Both parties have the right to be heard on the merits, and one party cannot require the other to come to such a hearing upon a mere motion to dismiss.* To dismiss under such circumstances would be to decide that the case had no merits."

Rule 19(a) of the District Court of Appeals provides:

> "The appellant in this court *shall be entitled to open and conclude the case.* The rule is equivalent to statute." (*Bradley* v. *Pace*, 87 App. D. C. 11, 183 F. 2d 806.)

It is clear that Rule 73 permits the dismissal of an appeal without an argument, solely where the appellant fails to take the prescribed steps to bring the appeal on for argument. Where, as in this case, the petitioner complied with all the rules, she is entitled to be heard on the merits in an open court. To allow one appellant the benefit of an oral argument and deny such benefit to other appellants, is to deprive such appellant of equal protection of law and due process thereof. (Compare as to the function of the argument: *Journal of American Bar Association*, March 1958, p. 231; Sept. 1958, p. 831 and Dec. 1959, p. 1257.)

Motions to dismiss for alleged lack of merit cannot be disposed of without considering the merits themselves. The merits are the substance of any appeal to be presented to the Court by both the argument and briefs. Such motions are uniformly denied. (See numerous cases collected in *Corpus Juris Secundum*, Vol. 5, p. 483, Notes 37 and 38 and at p. 487, Note 65; and *Corpus Juris*, Vol. 4, pp. 574-5, Notes 77-79.)

The District Court of Appeals not only assumed in this case a power not conferred on it by Rule 73, but also brought itself in conflict with other Federal Courts of Appeals. Thus, in *Seeman* v. *United States* 40 F. 2d 88, the Court of Appeals for the Fifth Circuit said at page 89:

> "A motion was filed on behalf of the United States *to dismiss the appeal.* As to this, it is sufficient to say that the grounds urged are technical, unsubstantial and not jurisdictional.' The motion is overruled."

And in *U. S.* v. *Nudelman*, 207 Fed. 2d 109, the Court of Appeals for the Third Circuit said at page 110:

> "The United States, Appellee, filed a written motion to dismiss the appeal *because it was without merit. Such a motion cannot be granted since the appeal was directed to the merits.*"

Respondent cited below *Rooker* v. *Fidelity Trust Company*, 263 U. S. 413. In that case, both sides waived argument and submitted the case on consent by way of a motion to dismiss or affirm. The case falls within one of the well-known exceptions to the general rule. It has no application to the petitioner, as she never agreed to any such submission.

The denial of argument to petitioner should be reversed, and the Court of Appeals should be directed to hear the case in an open court with full argument, as prescribed by statutes and due process of law.

The District Court had jurisdiction over petitioner's cause of action.

Respondents contended in the District Court that it lacked jurisdiction of the action and that it should have been brought in the United States Court of Claims.

Section 1331, Title 28, *U. S. Code*, as amended, is in part as follows:

> "The District Courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, and arises under the Constitution, laws, *or treaties* of the United States."

The Act of August 9, 1955 (22 U. S. Code 1621, *et seq.*), and the disposition of the Soviet funds, flowed from and were consequent upon the Roosevelt-Litvinov Agreement and Litvinov Assignment of November 16, 1933.

The United States Court of Claims has no jurisdiction over a claim "growing out of or dependent upon *any treaty* entered into with foreign nations" (28 U. S. C. Sec. 1502).

In *United States* v. *Pink*, 315 U. S. 203, 230, this Court stated:

> "A treaty is a 'Law of the Land' under the supremacy clause (Art. VI, Clause 2) of the Constitution. Such international compacts and agreements as the Litvinov Assignment have a similar dignity."

And in *Altman & Co.* v. *United States*, 224 U. S. 583, 600, this Court held that the word "treaty" in the Circuit Court of Appeals Act includes the commercial agreement entered into by the Federal Government without approval of the Senate.

Congress has no power to deprive Federal Courts of the right and duty to examine and prohibit violations of the United States Constitution by administrative agencies of the United States Government.

Respondents contended below that because of the finality provisions of the Act of August 9, 1955 (22 U. S. C. 1641m), the Federal Courts were without authority to review violations of the Constitution of the United States resulting

from decisions and interpretations by respondent Commission. As stated by Chief Justice Hughes in *St. Joseph Stockyards Co.* v. *U. S.*, 298 U. S. 38 (1936), at page 52:

> "Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority."

In *Everlasting Development Corporation* v. *Descartes*, 95 Fed. Supp. 954, 192 F. 2d 1, cert. den. 342 U. S. 954, it was stated (959):

> "The question of whether it is within the power of a legislative body to circumvent judicial review in cases where an invasion of constitutional rights is asserted, has been the subject of exhaustive examination by the courts, and the decisions unanimously sustain the proposition that legislative bodies are without such power. *Estep* v. *U. S.*, 327 U. S. 114, 66 S. Ct. 423, 567; *Bridges* v. *Wimon*, 326 U. S. 135, 65 S. Ct. 1443, 2103; *Switchmen's Union of North America* v. *National Mediation Board*, 320 U. S. 297, 301, 64 S. Ct. 95; *Norton* v. *Cass County*, 5 Cir., 115 F. 2d 884, 886."

Accord, *Knowles* v. *Hirsch, et al.*, 65 Fed. Supp. 690.

The United States Constitution prohibits the United States Government, acting through Congress or the Treasury Department from seizing Tillman's property to pay private claims of other American citizens.

The Act of August 9, 1955 (69 Stat. 562, 22 U. S. C. 1621 *et seq.*) is violative of Amendment V to the United States Constitution and therefore unconstitutional, insofar as it directs without compensation and not for public purpose the use of the seized funds to pay unsecured private claims.

As stated hereinabove, James A. Tillman, American citizen, and resident of New York State, obtained in New York Courts liens by a warrant of attachment in his favor in the amount of $188,408.00, plus costs and expenses on the funds of Russo-Asiatic Bank held in New York by the Guaranty Trust Company and the National City Bank of New York, supported by due levies (R. 16-18). The attachment and levies were outstanding and in force on November 16, 1933, the date of the Roosevelt-Litvinov Agreement and Assignment. Accordingly, the United States Government took under the assignment, subject to the attachment and levies. Recognition of the Soviet Government by the United States Government did not affect the existing rights of American nationals in United States Courts against Soviet Property in the United States. (*U. S.* v. *Belmont*, 301 U. S. 324, 335; *Guaranty Trust Company* v. *U. S.*, 304 U. S. 126, 143; *Lehigh Valley R. R. Co.* v. *State of Russia*, 21 F. 2d 396, 401-2, and left "undisturbed diplomatically final non-appealable judgments and decrees of the American courts touching Russian affairs * * *." (*State of Russia* v. *National City Bank*; 69 F. 2d 44, 48.)

Congress has only such powers as are granted to it by the Constitution either expressly or by implication. *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198; 76 S. Ct. 273; *Ex Parte Quirin*, 317 U. S. 1, 63 S. Ct. 2. It may exercise its powers only within the limits of the Federal Constitution. *Lichter* v. *United States*, 334 U. S. 742, 68 S. Ct. 1294. Even a treaty approved by the Senate yields to the command of the Federal Constitution. *Todok* v. *Union State Bank*, 281 U. S. 449, 454; *Prevost* v. *Greneaux*, 60 U. S. 1, 7. An executive agreement such as the Roosevelt-Litvinov Agreement, and the Litvinov Assignment, command no higher power than a Congressional statute. *Rainey* v. *U. S.*, 232 U. S. 310, 316; *Horner* v. *U. S.*, 143 U. S. 570, 578. Neither may authorize that which the Constitution forbids. *Asakura* v. *Seattle*, 265 U. S. 332, 341; *Thomas* v. *Gay*, 169 U. S. 264, 271; *Geofroy* v. *Riggs*, 133 U. S. 258, 267.

Congress cannot vest judicial functions in the respondent Commission, an administrative agency, or confer upon it the powers to disregard or review State judgments in violation of Articles I, II, III and IV of the United States Constitution and Amendment V thereof.

The Act of August 9, 1955 is also violative of Section 1 of Article IV of the Constitution of the United States so far as it would deny full faith and credit to the judgments of State Courts.

On September 23, 1935, judgment for $210,497.20 was entered in the Supreme Court for the State of New York in favor of James A. Tillman and against the Russo-Asiatic Bank (R. 24, 25). When the judgment became final, it was, at the instance of Tillman, executed upon the deposits of the Russo-Asiatic Bank held by the Guaranty Trust Company and the National City Bank of New York, which deposits had already been levied upon on August 24, 1927, pursuant to Tillman's warrant of attachment of August 22, 1927 (R. 16-18).

Under New York Law, an attachment lien mergers in the judgment, and is continued in it (*supra*, at p. 4).

Respondent Commission asserted in effect that the Act of August 9, 1955 vested it with the power to recognize liens and judgments in full or in part, and that the determination of the Supreme Court of New York as to the extent and ownership of the liens to Tillman was not binding upon it, and demanded that petitioner present proof as to the origin of the claims underlying the liens and the judgment. Respondent declined to do so, relying on the Full Faith and Credit provisions of Section 1, Article IV of the Constitution. The latter requires full, untrammeled and unabridged credit for State judgments. *Davis* v. *Davis*, 305 U. S. 32, 39; *Haddock* v. *Haddock*, 201 U. S. 562, 26 S. Ct. 525.

In *Chicago and Southern Airlines* v. *Waterman Steamship Corporation*, 333 U. S. 103, it was stated (113):

> "Judgments, within the powers vested in Courts by the judiciary article of the Constitution, may not lawfully be revised, overturned *or refused faith and credit by another department of the Government.*"

Section 305 of the Act of August 9, 1955 is also violative of Articles II and III of the Constitution of the United States, and accordingly unconstitutional, insofar as it purports to confer power on respondent Commission to examine into and determine the merits of state judgments.

The right to review a Court judgment is a judicial function. Articles II and III of the Constitution of the United States provide for the separation of the judicial and executive functions of the Government. Respondent Commission is an agency of the Executive Branch.

The division of powers between Judicial and Executive departments is fundamental, and must be strictly observed. *O'Donoghue v. U. S.*, 289 U. S. 516; 53 S. Ct. 740; *Opinion of Justices*, 302 Mass. 605; 19 N. E. (2d) 807.

Judicial functions cannot be conferred on administrative agencies. *Rhodes* v. *City of Asheville*, 230 N. C. 759; 53 S. E. 2d 313; *City of Bristow* v. *Groom*, 194 Oklahoma 384; 151 Pac. 2d 936.

Under the Full Faith and Credit clause in Article IV of the Constitution, even Federal Courts cannot review substantive or procedural merits of State judgments, other than for fraud or lack of jurisdiction. *Titus* v. *Wallick*, 306 U. S. 282; 59 S. Ct. 557; *Cooper* v. *Reynolds*, 10 Wall. 308; *Fox* v. *McGrath*, 152 F. 2d 616.

To the extent that Section 305 of the Act of August 9, 1955 purports to confer on respondent Commission the right to re-examine Court judgments, it is unconstitutional, because of conflict with the intent and provisions of Articles II and III and IV, Section 1, of the Constitution.

Cases cited by the District Court of Appeals were not relevant to the issues on the appeal.

All the cases cited by the Court of Appeals in a memorandum handed down on an application for a reconsideration of its summary disposition of the appeal (App. 43) are its own decisions in which it held that the appeals from the decisions of the Foreign Claims Settlement Commission did not involve constitutional questions and that the Court of Appeals was without power to consider errors of facts made by the Commission or errors of law below, the level of conflicting with the provisions of the Federal Constitution.

This petitioner did not ask the Court of Appeals to consider any errors of fact or of law committed by the Commission in consideration of her claim. She asked to declare that the powers claimed by the Commission under provisions of Section 305 of the Act of August 9, 1955, made said provision unconstitutional as transgressing the prohibitions of Federal Constitution with regard to the division of governmental powers between judicial and executive departments and the finality of state and federal judgments.

The petitioner further asked the Court of Appeals to adjudge her rights under V and VII amendments to the Federal Constitution with regard to her liens to property in New York State as fixed by New York courts and confiscated by the Treasury Department without any compensation for the purpose not of using for public purpose but for distributing the property subject to such liens to other private American citizens.

Upon this application the petitioner further asks this Honorable Court to consider violation of its appellate powers and the federal statutes relating thereto by the Court of Appeals for the District of Columbia in denying her the right of argument before the full court, and deciding the merits of her appeal in a summary manner contrary to the due process of law and the constitutional guarantees of equal protection of law on the alleged ground

that petitioner's appeal is in the opinion of the appellee "not meritorious". We respectfully submit that any appeal may be similarly dismissed in the summary manner, because we do not know any appellee who does not claim and whose duty is not to claim that the appellant's appeal allegedly lacks "a meritorious issue" (App. 29).

Constitutional questions were duly raised and pressed by petitioner in the respondent Commission, the District Court and the Court of Appeals (R. 13, 24-30; J. App. 14-15; App. 34, 35).

Wherefore, your petitioner respectfully prays that because this case involves the correct interpretation of the Rules of Civil Procedure in the light of conflicting decisions of the Circuit Court of Appeals regarding appellate practice, the determination of the jurisdiction of the District Courts and the Court of Claims; important encroachments on the prerogatives of the judiciary by unconstitutional actions of the administrative agencies of the government or the Congress; deprivation of the petitioner of her property liens now worth in excess of three hundred thousand dollars through denial of constitutional guarantees, that the writ of certiorari be granted to her.

Respectfully submitted.

John Wattawa,
Borris M. Komar,
Counsel for Petitioner.

Lena S. Tillman,
Petitioner.

State of New York
County of New York } ss.:

Lena S. Tillman, being duly sworn, deposes and says, that she has read the foregoing petition; and the same is true to her knowledge.

Lena S. Tillman.

Sworn to before me this
January 8, 1960.

William S. Lefkowitz,
Notary Public, State of New York.
(Notarial Seal)

APPENDIX.

1. Statutes and treaties.

28 U. S. C., Chapter 3, Section 46(c):

"Cases and controversies shall be heard and determined by a court or division of not more than three judges * * *"

Rule 73 of Civil Procedure:

"Failure of the appellant to take any of * * * steps to secure the review * * * is ground for such action as the appellate court deems appropriate, which may include dismissal of appeals."

Rule 19(a) of the District Court of Appeals:

"The appellant in this court shall be entitled to open and conclude the case."

"International Claims Settlement Act of 1949.
[Act of March 10, 1950, c. 54, 64 Stat. 12,
22 U. S. C. § 1621, et seq.]

AN ACT

To provide for the settlement of certain claims of the Government of the United States on its own behalf and on behalf of American nationals against foreign governments.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the 'International Claims Settlement Act of 1949'".

* * * * * *

"Sec. 4. * * *

(h) The Commission shall notify all claimants of the approval or denial of their claims, stating the reasons and grounds therefor, and if approved, shall notify such claimants of the amount for which such claims are approved. Any claimant whose claim is denied, or is approved for less than the full amount of such claim, shall be entitled, under such regulations as the Commission may prescribe, to a hearing before the Commission, or its duly authorized representatives, with respect to such claim. Upon such hearing, the Commission may affirm, modify, or revise its former action with respect to such claim, including a denial or reduction in the amount theretofore allowed with respect to such claim.

The action of the Commission in allowing or denying any claim under this Act shall be final and conclusive on all questions of law and fact and not subject to review by the Secretary of State or any other official, department, agency, or establishment of the United States or by any court by mandamus or otherwise."

SOVIET CLAIMS ACT

"Public Law 285—84th Congress

Chapter 645—1st Session

[Act of March 10, 1950, c. 54, 64 Stat. 12, 22 U.S.C. § 1621, et seq. as amended by the Act of August 9, 1955, c. 645, 69 Stat. 572, 22 U.S.C. § 1641, et seq.]

To amend the International Claims Settlement Act of 1949, as amended, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the International Claims Settlement Act of 1949, as amended, is further amended by inserting after the first section thereof the following: 'TITLE I.

SEC. 2. The word 'Act', wherever it appears in title I in reference to the International Claims Settlement Act of 1949, is amended to read 'title'.

SEC. 3. The International Claims Settlement Act of 1949, as amended, is further amended by adding at the end thereof the following:

'TITLE II'

'VESTING AND LIQUIDATION OF BULGARIAN, HUNGARIAN, AND RUMANIAN PROPERTY

[The text of Title II is omitted]

'TITLE III

'CLAIMS AGAINST BULGARIA, HUNGARY, RUMANIA, ITALY, AND THE SOVIET UNION

'SEC. 301. As used in this title the term—

* * * * * *

'(2) "National of the United States" means (A) a natural person who is a citizen of the United States, or who owes permanent allegiance to the United States, and (B) a corporation or other legal entity which is organized under the laws of the United States, any State or Territory thereof, or the District of Columbia, if natural persons who are nationals of the United States own, directly or indirectly, more than 50 per centum of the outstanding capital stock or other beneficial interest in such legal entity. It does not include aliens.

* * * * * *

'(5) "Soviet Government" means the Union of Soviet Socialist Republics, including any of its present or former constituent republics, other political subdivisions, and any territories thereof, as constituted on or prior to November 16, 1933.

'(6) "Litvinov Assignment" means (A) the communication dated November 16, 1933, from Maxim Litvinov to President Franklin D. Roosevelt, wherein the Soviet Government assigned to the Government of the United States amounts admitted or found to be due it as the successor of prior governments of Russia, or otherwise, preparatory to a final settlement of the claims outstanding between the two Governments and the claims of their nationals; (B) the communication dated November 16, 1933, from President Franklin D. Roosevelt to Maxim Litvinov, accepting such assignment; and (C) the assignments executed by Serge Ughet on August 25, 1933, and November 15, 1933, assigning certain assets to the Government of the United States.

'(7) "Russian national" includes any corporation or business association organized under the laws, decrees, ordinances, or acts of the former Empire of Russia or of any government successor thereto, and subsequently nationalized or dissolved or whose assets were taken over by the Soviet Government or which was merged with any other corporation or organization by the Soviet Government.

'(8) "Commission" means the Foreign Claims Settlement Commission of the United States, established pursuant to Reorganization Plan Numbered 1 of 1954 (68 Stat. 1279).

'(9) "Property" means any property, right, or interest.

'SEC. 302. * * * The Secretary shall cover into the Treasury the funds collected by the United States pursuant to the Litvinov Assignment (including postal funds due prior to November 16, 1933, to the Union

of Soviet Socialist Republics because of money orders certified to that country for payment) and shall cover into the Soviet Claims Fund the funds so covered into the Treasury.

* * * * * *

'Sec. 305. (a) The Commission shall receive and determine in accordance with applicable substantive law, including international law, the validity and amounts of—

'(1) claims of nationals of the United States against a Russian national originally accruing in favor of a national of the United States with respect to which a judgment was entered in, or a warrant of attachment issued from, any court of the United States or of a State of the United States in favor of a national of the United States, with which judgment or warrant of attachment a lien was obtained by a national of the United States, prior to November 16, 1933, upon any property in the United States which has been taken, collected, recovered, or liquidated by the Government of the United States pursuant to the Litvinov Assignment. Awards under this paragraph shall not exceed the proceeds of such property as may have been subject to the lien of the judgment or attachment, nor, in the event that such proceeds are less than the aggregate amount of all valid claims so related to the same property, exceed an amount equal to the proportion which each such claim bears to the total amount of such proceeds; and

'(2) claims, arising prior to November 16, 1933, of nationals of the United States against the Soviet Government.

'(b) Any judgment entered in any court of the United States or of a State of the United States shall be binding upon the Commission in its determination, under paragraph (1) of subsection (a) of this section, of any issue which was determined by the court in which the judgment was entered.

'(c) The Commission shall give preference to the disposition of the claims referred to in paragraph (1) of subsection (a) of this section, over all other claims presented to it under this title.

* * * * *

'Sec. 310. (a) The Secretary of the Treasury shall make payments on account of awards certified by the Commission pursuant to this title as follows:

'(1) Payment in full of the principal amount of each award made pursuant to section 305 (a) (1) and each award of $1,000 or less made pursuant to section 303 or 304;

* * * * *

'(3) Payment in the amount of $1,000 on account of the principal of each award of more than $1,000 in amount made pursuant to section 303, 304, or 305 (a) (2);

'(4) After completing the payments under the preceding paragraphs of this subsection from any one fund, payments from time to time, in ratable proportions, on account of the then unpaid principal of all awards in the principal amount of more than $1,000, according to the proportions which the unpaid principal of such awards bear to the total amount in the fund available for distribution on account of such awards at the time such payments are made;

'45) After payment has been made in full of the principal amounts of all awards from any one fund, pro rata payments from the remainder of such fund then available for distribution on account of accrued interest on such awards as bear interest.

* * * * *

'Sec. 314. The action of the Commission in allowing or denying any claim under this title shall be final and conclusive on all questions of law and fact and not subject to review by any other official of the United States or by any court by mandamus or otherwise, and the Comptroller General shall allow credit in the accounts of any certifying or disbursing officer for payments in accordance with such action'."

2. Litvinov Assignment of November 16, 1933

The Litvinov Assignment* was in the form of a letter, dated November 16, 1933, to the President of the United States from Maxim Litvinov, People's Commissar for Foreign Affairs, reading as follows:

> "Following our conversations I have the honor to inform you that the Government of the Union of Soviet Socialist Republics agrees that, preparatory to a final settlement of the claims and counter claims between the Governments of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals, the Government of the Union of Soviet Socialist Republics will not take any steps to enforce any decisions of courts or initiate any new litigations for the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nations, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, now in litigation in the United States Court of Claims, and will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment.
>
> "The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the settlement

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* See Establishment of Diplomatic Relations with the Union of Soviet Socialist Republics, Dept. of State, Eastern European Series, No. 1 (1933) for the various documents pertaining to recognition.

referred to above not to make any claims with respect to:

"(a) judgments rendered or that may be rendered by American courts in so far as they relate to property, or rights, or interests therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest; or,

"(b) acts done or settlements made by or with the Government of the United States, or public officials in the United States, or its nationals, relating to property, credits, or obligations of any Government of Russia or nationals thereof."

This letter was acknowledged by the President on the same date, November 16, 1933. The acknowledgment, after setting forth the terms of the assignment, concluded:

"I am glad to have these undertakings by your Government and I shall be pleased to notify your Government in each case of any amount realized by the Government of the United States from the release and assignment to it of the amounts admitted to be due, or that may be found to be due, the Government of the Union of Soviet Socialist Republics, and of the amount that may be found to be due on the claim of the Russian Volunteer Fleet."

3. Papers in the Court of Appeals.

Appellee's Motion to Dismiss or Affirm

UNITED STATES COURT OF APPEALS,

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 15,254

LENA S. TILLMAN,

Appellant,

v.

ROBERT B. ANDERSON, Secretary of Treasury,

Appellee.

MOTION TO AFFIRM OR DISMISS.

Comes now the appellee, by its attorney, the United States Attorney, and moves that the judgment of the District Court dismissing the complaint for lack of jurisdiction be affirmed or that the appeal herein be dismissed for lack of a meritorious issue.

FACTS

Appellant, as administratrix of her deceased husband's estate, filed a claim against the Soviet Claims Fund. The basis of appellant's claim was alleged to be a certain legal matter instituted in August 1927 by appellant's decedent in a court of the State of New York against the Russo-Asiatic Bank.

After the claim was filed, the Commission requested that appellant present evidence to establish (1) the origin of appellant's claim and the name of the person in whose favor the claim originally arose and all subsequent owners, and their nationality and (2) how and when the claim against the Russo-Asiatic Bank arose. Appellant failed to comply

with the request. The Commission denied appellant's claim by a proposed decision dated August 1, 1956. Appellant filed objections to the proposed decision and a hearing was held. On October 9, 1956, the Commission issued an order providing that unless appellant within 10 days established (1) that the claim originally arose, in whole or in part, *in favor of a national* of the United States, and that a valid attachment lien was obtained prior to November 16, 1933, the Commission would affirm its proposed decision (J. A. 41).

Appellant did file some documentary matter, however, the Commission concluded that these documents did not satisfy the requirement of their order of October 9, 1956, and that eligibility under the act had not been established (J. A. 43). Accordingly, a final decision was entered on November 14, 1956, affirming the proposed decision (J. A. 44).

Appellant instituted this action in the United States District Court for the District of Columbia seeking a declaratory judgment. The complaint was dismissed by Judge Sirica on May 14, 1959, on the ground that the Court lacked jurisdiction over the subject matter.

Argument

It is well established that the action of the Commission in denying any claim is not subject to review by any court. *First National City Bank of New York* v. *Gillilland, et al.*, 103 U. S. App. D. C. 219, 257 F. 2d 223 (1958); *American and European Agencies, Inc.* v. *Gillilland, et al.*, 101 U. S. App. D. C. 104, 247 F. 2d 95 (1957), *cert. denied* 355 U. S. 884; *DeVegvar* v. *Gillilland, et al.*, 97 U. S. App. D. C. 126, 228 F. 2d 640 (1955), *cert. denied*, 350 U. S. 994.

The International Claims Settlement Act provides that a decision of the Commission shall be final and conclusive on all questions of law and fact and not subject to review by any court. 22 U. S. Code § 1641(m), 22 U. S. Code

1623(h). The above-entitled decisions sustain the constitutionality and binding effect of these non-reviewability proscriptions.

In *DeVegiar* v. *Gilliland, supra*, this Court assumed for purposes of argument that the non-reviewability provision would probably not prevent judicial relief in a situation where a claimant is denied consideration by reason of his race, creed or color. No such contention is made in the instant case.

A motion to affirm lies where dismissal of a complaint below is plainly correct. *Rooker* v. *Fidelity Trust Company*, 263 U. S. 413 (1923). For the reasons stated above, the trial court was correct in dismissing the complaint.

Wherefore, it is respectfully submitted, the judgment be affirmed or the instant appeal be dismissed.

/s/ OLIVER GASCH
OLIVER GASCH,
United States Attorney.

/s/ CARL W. BELCHER
CARL W. BELCHER,
Assistant United States Attorney.

/s/ DONALD S. SMITH
DONALD S. SMITH,
Assistant United States Attorney.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been mailed to attorney for appellant, John Wattawa, Esquire, 1317 F Street, N. W., Washington 4, D. C., this 7th day of October, 1959.

/s/ DONALD S. SMITH
DONALD S. SMITH,
Assistant United States Attorney.

Appendix.

Petitioner's Objections to Appellee's Motion.

UNITED STATES COURT OF APPEALS,

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 15,254

LENA S. TILLMAN, Administratrix,
Appellant,

v.

ROBERT B. ANDERSON, Secretary of the Treasury, et al.,
Appellees.

OBJECTIONS TO MOTION TO AFFIRM OR DISMISS

Comes now Appellant Lena S. Tillman, Administratrix, and makes the following Objections to the Motion by Appellee Robert B. Anderson, Secretary of the Treasury, to affirm or dismiss:

I

THE MOTION LACKS PROCEDURAL AUTHORITY

Appellee cites no Rule or ruling of this Court as authority for this Motion, and no Rule or authority therefor appears among the Court's General Rules.

The Order of the District Court dismissing the Complaint is a final Order (J. App. 49), and the prosecution of an appeal therefrom to this Court is permitted by law, on compliance with the requirements of Federal Rule of Civil Procedure 73, and of this Court's Rule 15; all of which requirements Appellant fulfilled.

Appendix.

This Court's Rule 19, Oral Argument, provides that an appellant shall be entitled to open and close the case.

Disposition of an appeal under the existing circumstances in the manner sought by Appellee's Motion is nowhere authorized by applicable Rules, and the Motion should not receive consideration.

II

The Motion Is Not Timely

Appellant filed the original record herein on July 10, 1959, the attorney below for defendants (Appellees) being then so notified by the Clerk.

On July 20, 1959, Appellant filed Appellant's Statement of Points, and also Statement of Parts of the Record Appellant Proposes to Print in the Joint Appendix, after copies thereof had been served by Appellant on the attorney below for defendants.

On August 3, 1959, Harry T. Alexander, Esq., Assistant United States Attorney, called Appellant's attorney on the telephone, and advised that Appellant's designation of the material to be printed in the Joint Appendix was satisfactory to the United States Attorney's office.

On August 13, 1959, Appellant filed Motion, after serving copy on the attorney below for defendants, to extend to and including September 18, 1959, the time to file Brief for Appellant herein, which Motion was granted on August 24, 1959, no objection thereto having been indicated.

Thereafter, on September 18, 1959, 25 copies of Brief for Appellant and Joint Appendix were filed herein, together with certificate of service of copies upon said attorney below.

The pending Motion, singly by Appellee Robert B. Anderson to Affirm or Dismiss, was filed herein on October 7, 1959, and appearances for Appellees simultaneously en-

tered, approximately three months after the original record had been filed.

In addition to her expense for cost bond on appeal, and for the filing fee herein, Appellant incurred, and on October 19, 1959 paid, $268.06 for printing the required Brief for Appellant and Joint Appendix.

Accordingly Appellee's Motion is not timely, or conscionable.

Appellee Misconceives The Issues

The District Court dismissed the Complaint on the ground that it lacked jurisdiction over the subject matter of the cause (J. App. 49), a question on which Appellee's Motion is silent.

The true claims of Appellant, and the real issues on the appeal, are set out in Brief for Appellant, namely Statement of Questions Presented (i), Statement of Points (13), Summary of Argument (14, 15), and Argument (16-30).

Moreover, the decisions cited in Appellee's Motion are inapplicable.

In *First National City Bank of New York* v. *Gilfillan, et al.*, 103 U. S. App. D. C. 219, 257 F. 2d 223 (1958), the claim had been absolutely assigned to one Grant, a resident of New York but a national of Great Britain. In its decision denying the claim, the Commission pointed out that the warrant of attachment had not been issued in favor of a national of the United States, and that a lien had not been obtained by a national of the United States pursuant to the attachment and judgment. On its above appeal the Bank contended that since it was the "beneficial owner" of the claim held by Grant, the attachment and the lien were "in its favor", and the Statute satisfied. This Court remarked that the Commission did not find that the Bank was the beneficial owner, but apparently intended

to hold that even if it were such, still because the attachment and judgment and lien had been obtained by Grant, the conditions of the Statute were not satisfied. The Court added that Congress could have expressly disqualified *beneficiaries of oral trusts* from the benefits of the Statute, and that if its delegate with unreviewable power denies those benefits to such persons, it has not violated the Constitution, and also found that limitations had run against the claim. In the instant matter, Appellant's decedent was at all times concerned, namely from 1916 until his death in 1950, a citizen of the United States. He was not a beneficial owner of the claim or a beneficiary of an oral trust, but always its true and actual owner, and there is moreover no valid limitations issue.

In *American and European Agencies, Inc.* v. *Gilliland*, 101 U. S. App. D. C. 247 F. 2d 95, this Court (Circuit Judge Miller dissenting) held that the bar of judicial relief contained in the International Claims Settlement Act of 1949 (22 U. S. C. A., Sections 1622-1627) precluded the claimant from maintaining action upon the contention that it was not accorded the type of hearing provided by Statute, which was a question of law not subject to judicial review where claimant had been denied no Constitutional rights in the hearing.

In *DeVegvar* v. *Gilliland et al.*, 97 U. S. App. D. C. 125, 228 F. 2d 640, this Court (Circuit Judge Miller dissenting) in affirming the dismissal of the Complaint, stated (128):

> "No doubt the provisions of Section 4(d) [of aforesaid International Claims Settlement Act of 1949] do not bar certain types of judicial action. * * * No violation of Constitutional right is suggested here: plaintiff-appellant makes no contention, for example, that the United States has taken her property without paying for it. What happened was that Yugo-Slavia took plaintiff's property."

Appendix.

CONCLUSION

Accordingly, Appellee's Motion to Affirm or Dismiss should be denied, and the appeal allowed to proceed to determination on its issues.

Respectfully submitted,

JOHN WATTAWA,
JOHN WATTAWA,
1317 F Street, N.W.,
Washington 4, D. C.,
Attorney for Appellant.

BORRIS M. KOMAR,
BORRIS M. KOMAR,
349 East 49th Street,
New York 17, N. Y.

CERTIFICATE OF SERVICE

Copy of the foregoing Objections delivered by hand this 15th day of October, 1959, to Donald S. Smith, Esq., Assistant United States Attorney, United States Court House, Washington 1, D. C., attorney for Appellee Robert B. Anderson.

JOHN WATTAWA,
JOHN WATTAWA.

Appendix.

Order Dismissing Appeal.

UNITED STATES COURT OF APPEALS,

FOR THE DISTRICT OF COLUM. CIRCUIT.

September Term, 1959

No. 15,254.

LENA S. TILLMAN, Administratrix of the Estate of James A. Tillman, Deceased,

Appellant,

v.

ROBERT B. ANDERSON, Secretary of the Treasury, et al.,

Appellees.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, JOSEPH W. STEWART, CLERK.

Before: PRETTYMAN, Chief Judge, DANAHER and BASTIAN, Circuit Judges, in Chambers.

ORDER

Upon consideration of appellees' motion to affirm or dismiss and of appellant's objections, it is

ORDERED by the Court that the judgment of the District Court on appeal herein is affirmed.

Per Curiam.

Dated, October 30, 1959.

Appendix.

Appellant's Motion for Reconsideration.

UNITED STATES COURT OF APPEALS,

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

September Term, 1959

No. 15,254

LENA S. TILLMAN, Administratrix of the Estate of James A. Tillman, Deceased,

Appellant,

v.

ROBERT B. ANDERSON, Secretary of the Treasury, et al.,

Appellees.

MOTION FOR RECONSIDERATION

Comes now appellant, Lena S. Tillman, and under the Court's Rule 31 moves for reconsideration of appellees' Motion to Affirm or Dismiss, subject to the Court's Order herein dated October 30, 1959, and respectfully shows:

1. The sole procedural authority cited by appellees for their Motion is "*Rooker* v. *Fidelity Trust Company*, 263 U. S. 413 (1923)". But that authority is wholly inapplicable, because as shown from the Report, that cause was submitted on motion to dismiss or affirm. There has been no such submission here.

2. It is provided in Section 46(c), Chapter 3 (Courts of Appeals), Title 28, *United States Code*, that "Cases and

controversies shall be heard and determined by a court or division of not more than three judges. * * *" The granting of appellees' Motion to Dismiss or Affirm denies appellant the right to be heard.

3. Paragraph (a) of this Court's Rule 19, Oral Argument, states that an appellant shall be entitled to open and conclude the case. And the Rules of this Court have the force and effect of law. *Bradley* v. *Pace*, 87 U. S. App. D. C. 11, 183 F. 2d 806.

4. Appellant fulfilled all requirements prescribed by the Federal Rules of Civil Procedure, and by the Rules of this Court, for the maintenance of her appeal, and in the circumstances the denial of a plenary hearing is a denial of due process.

5. There is no authority under the Rules of this Court for such denial.

It is stated under Rule 6, Practice, that except as otherwise provided in the Rules, the practice in this Court shall so far as practicable be the same as in the Supreme Court of the United States. Rule 16 of the Supreme Court relates to Motion to Dismiss or Affirm, but its provisions are inapplicable herein because while they permit the filing of a motion to dismiss or affirm, they require it to be filed within 30 days after receipt of the jurisdictional statement, which in turn, under that Court's Rule 13 is to be filed upon the docketing of the record. Under this Court's Rule 17 (b)(4), the jurisdictional statement awaits the filing of Brief for appellant and is incorporated therein as a part of the same. Moreover, the practice in the Supreme Court as for the matter herein would be governed by the rules relating to the granting of certiorari, while appellant has the right to appeal to this Court upon fulfillment of the specified procedural and jurisdictional requirements.

6. In *Sparrow* v. *Strong*, 70 U. S. Supreme Court Reports, 49, 50, 3 Wall. 97, 18 L. Ed. 49, the Supreme Court, applicable Court Rule apparently being then absent, had held:

> "And the record shows that the writ has been regularly sued out and returned. This Court, therefore, has jurisdiction, and it has been repeatedly held in similar cases, Minor v. Tillotson, 1 How. 288; Hecker v. Fowler, 1 Black, 95 (66 U. S. XVII, 45) that on a motion to dismiss, the court will look to the regularity of the writ and the fact of jurisdiction. Other questions must, in general, await final hearing."

7. Allowing plenary hearing on some appeals, and summary disposition of others on the merits, where, unlike the Supreme Court practice, no statute or Court rule governing such summary disposition exists for the guidance of the Court and litigants, could lead to practice uncertainties and denial of equal protection under law as guaranteed by the Constitution.

8. This Court's Order herein, dated October 30, 1959, does not indicate the grounds for affirmance. If the Court affirmed because jurisdiction is in the Court of Claims, as appellees alleged below (Brief for Appellant, pp. 18, 19), then appellant may still go there for relief. If the Court affirmed on appellees' defense of Statutes of Limitations (Brief for Appellant, pp. 20-24), it is important for appellant to be so advised in charting further procedural course. If the Court affirmed on the ground that the Commission's decision is unchallengeable even on Constitutional grounds (Brief for Appellant, pp. 24-30), then appellant should also be so advised in charting further procedural course. Appellant's case against appellee Secretary of the Treasury does not depend on the decision rendered by appellee Commission, and clearly raises Constitutional questions.

WHEREFORE, appellant's Motion for Reconsideration should be granted, the Court's Order dated October 30, 1959 vacated, and the appeal allowed to go to plenary hearing.

Respectfully submitted,

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BORRIS M. KOMAR,
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Of Counsel.

This Motion is presented in good faith and not for delay.

JOHN WATTAWA,
John Wattawa,
Attorney for Appellant.

CERTIFICATE OF SERVICE

Copy of the foregoing Motion for Reconsideration delivered by hand this 13th day of November, 1959, to Donald S. Smith, Esq., Assistant United States Attorney, United States Court House, Washington 1, D. C., attorney for appellees.

JOHN WATTAWA
John Wattawa

Appendix.

Order Denying Motion for Reconsideration.

UNITED STATES COURT OF APPEALS,

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

September Term, 1959

No. 15,254.

LENA S. TILLMAN, Administratrix of the Estate of JAMES A. TILLMAN, Deceased,

Appellant,

v.

ROBERT B. ANDERSON, Secretary of the Treasury, *et al.*,

Appellees.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Filed Dec. 11, 1959.

JOSEPH W. STEWART, Clerk.

Before: PRETTYMAN, Chief Judge, DANAHER and BASTIAN, Circuit Judges, in Chambers.

ORDER.

Upon consideration of appellant's motion for reconsideration of the order of this Court affirming the judgment of the District Court in this case, it is

Appendix.

ORDERED by the court that the motion for reconsideration is denied. See: *DeVegvar* v. *Gillilland, et al.*, 87 U. S. App. D. C. 126, 228 F. 2d 640 (1955), cert. denied, 350 U. S. 994; *Haas* v. *Humphrey*, 100 U. S. App. D. C. 401, 246 F. 2d 682 (1957); *Dayton* v. *Gillilland*, 100 U. S. App. D. C. 75, 242 F. 2d 227 (1957); *American and European Agencies* v. *Gillilland, et al.*, 101 U. S. App. D. C. 104, 247 F. 2d 95 (1957), cert. denied, 355 U. S. 884; *Zutich* v. *Gillilland*, 254 F. 2d 464 (6th Cir. 1958); *First National City Bank* v. *Gillilland, et al.*, 103 U. S. App. D. C. 219, 257 F. 2d 233 (1958).

Per Curiam.

Dated, December 11, 1959.

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No. 640

In the Supreme Court of the United States

OCTOBER TERM, 1959

LENA S. TILLMAN, ADMINISTRATRIX OF THE ESTATE OF JAMES A. TILLMAN, DECEASED, PETITIONER

v.

ROBERT B. ANDERSON, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY FOR THE RESPONDENTS IN OPPOSITION

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CHARLES K. ROTHERMEL, JR.,
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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 640

LENA S. TILLMAN, ADMINISTRATRIX OF THE ESTATE OF JAMES A. TILLMAN, DECEASED, PETITIONER

v.

ROBERT B. ANDERSON, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The *per curiam* orders of the court of appeals affirming the judgment of the district court (Pet. App. 37) and denying petitioner's motion for reconsideration (Pet. App. 42–43) are unreported. The order of the district court (J.A. 49) dismissing petitioner's complaint is also unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 37) was entered on October 30, 1959. The petition for a writ of certiorari was filed on January 13, 1960.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the courts below properly ruled that they had no jurisdiction over the subject matter of a complaint seeking review of a decision of the Foreign Claims Settlement Commission denying petitioner's claim under the Foreign Claims Settlement Commission Act of 1955.

2. Whether the court of appeals was required to hear oral argument in a case in which it was convinced on the basis of appellant's brief and the record that it was without jurisdiction.

STATUTES INVOLVED

The Foreign Claims Settlement Commission Act of 1955, 69 Stat. 562, provides in pertinent part:

> SEC. 305 [22 U.S.C. 1641d]. (a) The Commission shall receive and determine in accordance with applicable substantive law, including international law, the validity and amounts of—
>
> (1) claims of nationals of the United States against a Russian national originally accruing in favor of a national of the United States with respect to which a judgment was entered in, or a warrant of attachment issued from, any court of the United States or of a State of the United States in favor of a national of the United States, with which judgment or warrant of attachment a lien was obtained by a national of the United States, prior to November 16, 1933, upon any property in the United States which has been taken, collected, recov-

ered, or liquidated by the Government of the United States pursuant to the Litvinov Assignment.[1] Awards under this paragraph shall not exceed the proceeds of such property as may have been subject to the lien of the judgment or attachment; nor, in the event that such proceeds are less than the aggregate amount of all valid claims so related to the same property, exceed an amount equal to the proportion which each such claim bears to the total amount of such proceeds; * * *

* * * * *

(b) Any judgment entered in any court of the United States or of a State of the United States shall be binding upon the Commission in its determination, under paragraph (1) of subsection (a) of this section, of any issue which was determined by the court in which the judgment was entered.

(c) The Commission shall give preference to the designation of the claims referred to in paragraph (1) of subsection (a) of this section, over all other claims presented to it under this title.

SEC. 314 [22 U.S.C. 1641m]. The action of the Commission in allowing or denying any claim under this title shall be final and conclusive on all questions of law and fact and not subject to review by any other official of the United States or by any court by mandamus or otherwise, and the Comptroller General shall allow credit in the accounts of any certifying or disbursing

[1] For the text of the Litvinov Assignment, see Pet. App. 27–28. Under the Litvinov Assignment, the Soviet Government assigned to the Government of the United States all its claims against American nationals. See *United States* v. *Pink*, 315 U.S. 203; *Guaranty Trust Co.* v. *United States*, 304 U.S. 126; *United States* v. *Belmont*, 301 U.S. 324.

officer for payments in accordance with such action.

SEC. 316 [22 U.S.C. 1641o]. The Commission shall complete its affairs in connection with the settlement of claims pursuant to section 305(a)(1) not later than two years, and all other claims pursuant to this title not later than four years, following the date of enactment of this title [August 9, 1955], or following the date of enactment of legislation making appropriations to the Commission for the payment of administrative expenses incurred in carrying out its functions under this title, whichever date is later.

Pursuant to Section 318 of the Foreign Claims Settlement Commission Act (22 U.S.C. 1641q), the following provisions of the International Claims Settlement Act of 1949, 64 Stat. 12, are applicable to claims under Section 305(a)(1):

SEC. 4 [22 U.S.C. 1623]. * * *

(b) Each decision by the Commission pursuant to this Act * * * shall consfitute a full and final disposition of the case in which the decision is rendered.

* * * * *

(h) * * * The action of the Commission in allowing or denying any claim under this Act shall be final and conclusive on all questions of law and fact and not subject to review by the Secretary of State or any other official, department, agency, or establishment of the United States or by any court by mandamus or otherwise.

* * * * *

SEC. 7 [22 U.S.C. 1626]. * * *

(e) Any person who makes application for any such payment shall be held to have consented to all provisions of this Act.

(f) Nothing in this Act shall be construed as the assumption of any liability by the United States for the payment or satisfaction, in whole or in part, of any claim on behalf of any national of the United States against any foreign government.

STATEMENT

Under the Foreign Claims Settlement Commission Act of 1955, 69 Stat. 562, Congress empowered the Foreign Claims Settlement Commission to make awards from a fund representing proceeds of collection by the United States of claims assigned to it by the Soviet Government under the Litvinov Assignment of 1933. On March 22, 1956, petitioner, as administratrix of the estate of James A. Tillman, filed with the Commission a claim against this fund under Section 305(a)(1) of the Act, *supra*, pp. 2–3. This claim was based upon a 1935 default judgment of a New York court for $210,675.05 on behalf of petitioner's decedent against the Russo-Asiatic Bank (J.A. 24–25), and a warrant of attachment issued in 1927 upon the latter's assets (J.A. 16–18). On August 1, 1956, the Commission issued a proposed decision (J.A. 32–37) denying petitioner's claim on the ground that petitioner had failed to prove that her claim came within Section 305(a)(1) which requires that the

claim "originally accru[e] in favor of a national of the United States * * *."[2]

The Commission stated that it had requested such evidence from petitioner without success (J.A. 33)[3] and had itself conducted an independent investigation (J.A. 34–36), as contemplated by the statute (22 U.S.C. 1623(b), 1641(q)), which indicated that at least part of petitioner's claim did not originate with Tillman (J.A. 36–37). No determination was made by the Commission as to whether petitioner had satisfied the additional requirement of Section 305(a)(1) that a "judgment or warrant of attachment * * *

[2] This provision was enacted in order to give highest priority to American claims in a fund which Congress was certain would be sufficient to satisfy only a small percentage of the total claims. H. Rept. 624, 84th Cong., 1st Sess., p. 2; S. Rept. 1050, 84th Cong., 1st Sess., pp. 9–10, 12. And Congress clearly intended that no general appropriations be used either in satisfaction of claims or for administration expenses. *Id.* at p. 2.

[3] Petitioner's inability to furnish such evidence may be inferred from the following account appearing in the opinion of Judge Rifkind in *Steingut* v. *Guaranty Trust Co. of New York*, 58 F. Supp. 623, 642 (S.D.N.Y.), affirmed, 161 F. 2d 571 (C.A. 2), certiorari denied, 332 U.S. 807: "On September 23, 1935, he [James A. Tillman] obtained a default judgment in the Supreme Court, Queens County, for $210,675.05. His claim arose out of the alleged dishonor of a check drawn by him for 72,000 Rubles on Russo-Asiatic Bank, Petrograd, on September 18, 1918 and included additional claims *assigned to him by Russian nationals* in 1927" (emphasis added). Moreover, prior to the default judgment in 1935, two federal courts and three state courts each had unanimously ruled on the merits denying recovery to Tillman for his own claim arising out of the dishonor on September 18, 1918, of the 72,000 ruble draft. *Tillman* v. *Russo-Asiatic Bank*, 51 F. 2d 1023 (C.A. 2, 1931); *Tillman* v. *Russo-Asiatic Bank*, 240 App. Div. 710, 264 N.Y.S. 714 (2d Dept., 1933), affirmed, 264 N.Y. 421, 191 N.E. 495 (1934).

lien was obtained by a national of the United States, prior to November 16, 1933" [4] (J.A. 37, 41, 42).

The Commission held a hearing on September 13, 1956, on the proposed order (J.A. 43). Since the Commission continued to consider the record "insufficient" as to the origin of petitioner's claim (J.A. 43), it issued an order which stated that unless petitioner, within ten days, sustained her burden of proving that the claim originally arose in favor of an American national, the Commission would affirm its proposed decision (J.A. 38–41). Still unsatisfied, the Commission, on November 14, 1956, issued its final decision denying petitioner's claim (J.A. 41–44).

Petitioner then instituted declaratory judgment proceedings in the District Court for the District of Columbia against the Secretary of the Treasury and the members of the Foreign Claims Settlement Commission seeking judicial review of the Commission's determination (J.A. 14–15). Upon motion by the government, the district court (Sirica, J.) dismissed the complaint "on the ground that the Court lacks jurisdiction over the subject matter of the cause" (J.A. 49). An appeal was taken, and after the filing of petitioner's brief and a joint appendix, the Court of Appeals for the District of Columbia Circuit affirmed the judgment of the district court without hearing oral argument. Petitioner's motion for reconsideration was denied.

---

[4] Petitioner concededly did not obtain a judgment until 1935, and in *Steingut* v. *Guaranty Trust Co. of New York*, *supra*, 58 F. Supp. at 643, the court specifically held that Tillman did not have an attachment in effect against Russo-Asiatic property as of November 16, 1933.

1. Congress, in establishing the Foreign Claims Settlement Commission, provided that "The action of the Commission in allowing or denying any claim under this title shall be final and conclusive on all questions of law and fact and not subject to review by * * * any court by mandamus or otherwise * * *."[5] This petition constitutes the sixth attempt to have this Court review decisions of the Court of Appeals for the District of Columbia Circuit adhering to that express statutory provision. *First National City Bank of New York* v. *Gillilland*, 257 F. 2d 223, certiorari denied, 358 U.S. 837; *American and European Agencies* v. *Gillilland*, 247 F. 2d 95, certiorari denied, 355 U.S. 884; *Haas* v. *Humphrey*, 246 F. 2d 682, certiorari denied *sub nom. Haas* v. *Anderson*, 355 U.S. 854; *Dayton* v. *Gillilland*, 242 F. 2d 227, certiorari denied, 355 U.S. 813; *De-*

[5] Sec. 314, Foreign Claims Settlement Commission Act of 1955, 22 U.S.C. 1641m, *supra*, p. 3; see Sec. 318 of that Act, 22 U.S.C. 1641q, and Sec. 4(h), International Claims Settlement Act of 1949, 22 U.S.C. 1623(h), *supra*, p. 4.

The fixed Congressional purpose to accord absolute, unqualified finality to the decisions of the Commission is further confirmed by the legislative history of the Foreign Claims Settlement Commission Act. The committee reports in both Houses specifically noted the finality provisions (S. Rept. 800, 81st Cong., 1st Sess., pp. 5–6; H. Rept. 770, 81st Cong., 1st Sess., pp. 6–8); the minority report in the House took specific exception to the finality provisions (H. Rept. 770, Part 2, 81st Cong., 1st Sess., p. 2); a major heading in the presentation of the legislation by its sponsors on the floor of the House was called "Finality of Awards" (95 Cong. Rec. 8840); and the House, after considerable debate, rejected an amendment by Congressman Keating, which would have provided judicial review (95 Cong. Rec. 8853–8855). See also 95 Cong. Rec. 8845, 8847.

Vegvar v. *Gilliland*, 228 F. 2d 640, certiorari denied, 350 U.S. 994. And this Court has repeatedly upheld the constitutional power of Congress to deny judicial review of such an administrative agency's determinations. See, *e.g.*, *Ludecke* v. *Watkins*, 335 U.S. 160; *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297; *Z. & F. Assets Corp.* v. *Hull*, 311 U.S. 470; *United States* v. *Babcock*, 250 U.S. 328.

The only feature differentiating the instant case in any way from the five previous cases decided by the court of appeals below is that here petitioner phrases her objections to the Commission's determination in terms of constitutional issues. We submit, however, that these contentions are completely unsubstantial.

(*a*) Petitioner claims (Pet. 3, 7, 14–15) that her property was taken by the Federal Government for non-public purposes and without just compensation in violation of the Fifth Amendment to the Constitution. The "property" allegedly taken seems (see Pet. 15) to have been funds of the Russo-Asiatic Bank on deposit with the Guaranty Trust Company of New York and the National City Bank of New York, subject to a warrant of attachment in favor of petitioner's decedent. Petitioner, however, fails to mention that the "taking" of these funds by the government was ordered by a federal court in a case in which petitioner was a party and in which it was conclusively determined that petitioner's right to the deposits was subordinate to that of the United States. *Steingut* v. *Guaranty Trust Co. of New York*, 58 F. Supp. 623, 642–643 (S.D.N.Y.), affirmed, 161 F. 2d

571 (C.A.2), certiorari denied, 332 U.S. 807; see *United States v. National City Bank of New York*, 90 F. Supp. 448, 450 (S.D.N.Y.). Accordingly, under the principles of collateral estoppel, petitioner cannot now claim that her property was taken by the United States.

(*b*) Petitioner's full faith and credit and separation of powers arguments (Pet. 7, 13–14, 16–17) likewise are completely without substance. The Commission was under an obligation to extend full faith and credit[*] to the 1935 default judgment in the New York Supreme Court only with respect to issues which that court determined. The dispositive issue before the Commission—the nationality of the person(s) to whom the claim asserted by petitioner first accrued—was not before the New York court. As to any separation of powers problem, quite apart from the fact that petitioner has waived any right she had to challenge the statutory scheme (see 22 U.S.C. 1626(e), *supra*, p. 5), there can be no serious question as to the constitutional power of the Commission to rule on the applications submitted to it. Cf. *Sunshine Coal Co.* v. *Adkins*, 310 U.S. 381, 400; *Selective Draft Law Cases*, 245 U.S. 366, 389; *Zakonaite* v. *Wolf*, 226 U.S. 272, 275.

2. Petitioner points to the failure of the court of appeals to order oral argument on her appeal and

[*] See Sec. 305(b) of the Foreign Claims Settlement Act of 1955, 22 U.S.C. 1671d(b), *supra*, p. 3.

urges that "to allow one appellant the benefit of an oral argument and deny such benefit to other appellants, is to deprive such appellant of equal protection of law and due process thereof" (Pet. 11). This Court, however, often disposes of cases appealed to it without hearing argument, and, indeed, will sometimes reverse without affording the party winning below an opportunity to argue the merits. See *Harris* v. *Pennsylvania R. Co.*, 361 U.S. 15, 17. It is thus clear that the Constitution does not guarantee every litigant able to pay the filing fees in an appellate court a right to oral argument—particularly where, as in the instant case, she has had the opportunity to submit a brief.

Petitioner also argues (Pet. 10–12) that the Federal Rules of Civil Procedure and the Rules of the United States Court of Appeals for the District of Columbia Circuit required the Court of Appeals to hear oral argument in this case. We submit, however, that the rules which petitioner cites completely fail to support her position. Moreover, the court of appeals acted here on motion of the government to dismiss or affirm (see Pet. App. 29–31, 37), and Rule 31(j) of the Rules of the United States Court of Appeals for the District of Columbia Circuit unambiguously provides that such motions "shall be considered and ruled upon in chambers, and no oral argument thereon will be permitted unless directed by the court."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1960.

U.S. GOVERNMENT PRINTING OFFICE: 1960

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No. 640

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

LENA S. TILLMAN, Administratrix of the Estate of James A. Tillman, Deceased,

Petitioner,

vs.

ROBERT B. ANDERSON, Secretary of the Treasury, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF THE PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 640

LENA S. TILLMAN, Administratrix of the Estate of JAMES A. TILLMAN, deceased,

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF THE PETITIONER

Correction of Questions Presented

Petitioner did not ask the Courts below or this Court "to review a decision of the Foreign Claims Settlement Commission". Petitioner seeks to declare the provisions of Section 305 of Act (69 Stat. 562) 22 U. S. C. 1641d as construed and applied by the Commission unconstitutional by arrogating to it the power to review and ignore final judgment of the State Court and attachment liens created thereby.

The Government also conveniently overlooked that petitioner's claim against Secretary Anderson is completely

independent of the constitutionality of said Section 305. It seeks declaration as to the right of the Federal Government to seize private funds of the Russo-Asiatic Bank in New York amounting concededly to over $4,000,000 and subject to her lien now worth about $300,000 without compensation and not for public purpose but for the purpose of distributing them to other private American citizens.

Petitioner also seeks determination whether her claim against Treasury Department is within the jurisdiction of the District Court or the Court of Claims.

Supplemental Argument

1. Validity of Tillman's lien.

Although the Government passed in silence confiscation of petitioner's liens without compensation and for purposes forbidden by the Federal Constitution in "Questions Presented", its brief attempts to deal with this part of petitioner's complaint under subdivision (a) of its "Argument".

The claim of the Government that the decision of Judge Rifkind in *Steingut* v. *Guaranty Trust Co.*, 58 F. Supp. 623, disposed of the validity of appellant's liens is without any foundation.

The opinion of Judge Rifkind covered two cases: The equity case of *Steingut* v. *Guaranty Trust Co.* and the case at law of *United States* v. *Guaranty Trust Co.* James A. Tillman intervened in the equity suit *but not in the action at law*. The two cases were tried together *but not consolidated*. Tillman filed his claim with Steingut, as Receiver of the Russo-Asiatic Bank, and when Judge Rifkind dismissed the equity action of Steingut, as Receiver, Tillman's claim became academic. The holding was that the United States had a superior right *to hold the funds* as against the State Receiver.

Judge Rifkind himself recognized that fact in his opinion and said at pages 623 and 642:

> "To summarize: by means of Sec. 977-b and the orders made therein, New York has gone beyond the establishment of a device for the protection of its citizens who are creditors of Russo-Asiatic (Bank) or of those who did business with it in New York; it has established a complete system of administration founded upon a policy of non-recognition of the Russian nationalization decrees insofar as New York assets are concerned. Enforcement of their policy would collide with and subtract from the Federal policy; *U. S.* v. *Pink*, 315 U. S. 203, 231; 62 S. Ct. at page 566; 86 L. Ed. 796. It must, therefore, yield * * *
>
> "On December 29, 1939, Tillman filed a claim with the receivers founded upon the same judgment.
>
> "Had the receivers prevailed in their action, Tillman could not have judgment in this action but would be relegated to his claim in receivership. Civil Practice Act, Sec. 977 (16); *Walling* v. *Miller*, 108 N. Y. 173, 15 N. E. 65, 9 Am. St. Rep. 400. *The receivers having failed, the question whether the filing of his claim with the receivers constitutes a waiver of his claim in this court, is not presented*" (citing numerous authorities).

Thus, the discussion of the alleged rights of the interveners in the equity action constituted mere dicta. Judge Rifkind concluded his opinion as follows, at page 643:

> "It follows that *in the equity action*, the complaints of the receiver's and intervenors Tillman and Millard are to be dismissed; and, the cross-claim of defendant against Millard is likewise dismissed; and *that in the two actions at law*, judgment is to be given in favor of the United States."

The Government's two law actions did not involve the validity of Tillman's liens because he was not a party to them and the Receiver's action in equity was not between Tillman and the Receiver, but between Receiver and Tillman and the Guaranty Trust Co. Tillman had no need or opportunity to litigate the validity of his lien in those three actions. Besides, the Receiver never disputed the validity of Tillman's liens and in fact paid to Tillman in 1953 $10,000.00, his alliquot share of the assets remaining in the receivership (see complaint, par. 12, J. App. pp. 7, 8).

In *U. S.* v. *Pink*, 315 U. S. 203, this Court said at page 216:

> "The Moscow case is not res judicata, *since respondent was not a party to that suit. Stone* v. *Farmers' Bank of Kentucky*, 174 U. S. 409; *Rudd* v. *Cornell*, 171 N. Y. 114, 127-128, 63 N. E. (2d) 823; *St. John* v. *Fowler*, 229 N. Y. 270, 274; 128 N. E. 199."

2. Right to review Unconstitutional Acts of the Commission.

The Government concedes that petitioner's case differs from the prior cases cited in its brief, because she "phrases her objections * * * in terms of constitutional issues" (its brief at p. 9).

The Circuit Court of Appeals itself in one of the very cases cited by the Government held that it had jurisdiction to review violations of the Federal Constitution by the Foreign Claims Settlement Commission. In *De Vegvar* v. *Gilliland*, 228 Fed. 2d, certiorari denied 350 U. S. 994, it stated (97 U. S. App. D. C. 126, 128):

> "No doubt the provisions of section 4(d) (of International Claims Settlement Act of 1949) *do not bar* certain types of judicial action. * * * No violation of Constitutional right is suggested here; plaintiff appellant make no contention, for example, that the *United States has taken her property without paying for it.*"

This is the precise contention of this petitioner.

3. The Nationality of the Claim.

Government's brief points out that 1949 Act requires in Section 305 (a) (1) that the claim "originally accrue in favor of a national of the United States". This was inserted in the act to prevent transfer by other nationals of their claims to United States citizens pending the enactment of the 1949 law. Congress considered and dealt with only two classes of Russian claims in that Act. Thus, Senate's Committee of Foreign Relations (Report 1050, 84th Cong. 1st Sess.) in reporting the Act said at pages 5, 6:

> "Russian claims are disposed of in section 305. They include *two* general classes: (1) Claims founded on liens which had been obtained prior to November 16, 1936, by United States nationals arising out of a judgment or warrant of attachment against property in the United States subsequently taken over by the Government under the Litvinov Assignment; and (2) claims of nationals of the United States against the Soviet Union arising prior to November 16, 1933, the date of the assignment. * * * Lien-claimants, it was felt, were entitled to a priority in the payment of their claims over other claims against the Soviet Government which had not attained a comparaible legal status."

James A. Tillman became a citizen and resident of the United States in 1916. He obtained his liens on the funds of the Russo Asiatic Bank in New York in 1927. These facts are undisputed. No one but Tillman either obtained or ever held his attachment liens. The Supreme Court of New York determined his ownership and the amount of his lien. When the Act of 1949 spoke of "original accrual of the claim" it clearly meant either original lien or the original unsecured claim. Tillman's lien from its origin belonged to an American national. What the Con-

mission sought to do was to investigate the basis of the decision of the New York Supreme Court and the amount of the lien as fixed by its judgment in which under the New York law the lien merged (*Ackerman* v. *Tobin*, 22 Fed. 2d 541-4).

Federal Constitution requires full faith and credit to be given by administrative agencies of the Government to final non appealable judgments of the state courts. Even federal courts cannot review the substantive or procedural merits of the final state judgments. (See pp. 16 and 17 of the main petition herein.)

In so far as the Commission claimed that it derived such powers from section 305 of the Act of 1949, that Act was and is unconstitutional. The petitioner, an interested and aggrieved citizen of the United States, seeks such declaration from the Court, and not a review of the Commission's decision in her case.

There is no question that the Congress never contemplated such result as it desired that "lien claimants" be first paid in full, so that the balance of the collected funds could be applied to payment of unsecured claims, free of liens. Congress never intended to confiscate liens without full payment. The Commission's acts to the contrary were clear violations of the constitutional limitations on governmental powers.

4. Conflict between Circuits as to right to dismiss by a motion an appeal on the merits.

We have shown in our petition (at pp. 12-14) that the Third and Fifth Circuits differed with District of Columbia Circuit on the right of the Circuit Court of Appeals to dismiss an appeal on the merits on a motion made before the argument.

The Government attempts to rely on Rule 31 (j), but that Rule clearly deals with procedural matters only. Besides, if not so confined, the Rule clearly conflicts with

Rule 19 (a), which provides: "The appellant in this court *shall* be entitled to open and conclude the case."

The practice in this Court is not a precedent for that in the Courts of Appeals. This Court has a choice of allowing or disallowing appeals to it in its discretion. The Circuit Courts have a statutory duty to hear and decide on the merits *all* appeals taken as prescribed by law. On the other hand, the Government ignores the decisions of this Court defining the nature of the motions to affirm or dismiss and their scope. Said this Court in *Sparrow v. Strong*, 70 U. S. 49, 50; 3 Wall. 97:

> "* * * it has been repeatedly held in similar cases, Minor v. Tillotson, 1 How. 288; Hecker v. Fowler, 1 Black 95, (66 U. S. 45) that *on a motion to dismiss, the court will look to the regularity of the writ and the fact of jurisdiction.* Other questions must, in general, await final hearing."

Here, the petitioner's appeal was regular in every respect, and the court below expressly held that it has jurisdiction to hear and pass on constitutional violations (*supra*, at p. 4). The Government recognized these facts as it expressly moved to dismiss "for lack of meritorious issue". (Petition, App. p. 29). Other Circuit Courts of Appeal held that the merits can be disposed of only in a plenary hearing after argument as required by U. S. C. 28, Chapt. 3, Sec. 46 (c).

CONCLUSION

For the reasons set forth in the petition and this supplement thereto, the petitioner prays that a writ of certiorari should be granted.

Respectfully submitted,

JOHN WATTAWA,
BORRIS M. KOMAR,
Counsel for Petitioner.

February, 1960.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 640

LENA S. TILLMAN, Administratrix of the Estate of James A. Tillman, Deceased,

Petitioner,

against

ROBERT B. ANDERSON, Secretary of the Treasury, *et al.*,

Respondents.

PETITION FOR RECONSIDERATION OF A DENIAL OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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Foreign Claims Settlement Commission Act of 1955; 69 Stat. 562:

Section 305 (22 U. S. C. 1641(m) et seq. 2, 5, 6

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Lena S. Tillman, administratrix of the estate of James A. Tillman, deceased, respectfully requests reconsideration of the denial by this Honorable Court of her petition for a writ of certiorari entered in the above-entitled case on February 29, 1960.

Grounds Urged

The Solicitor-General informed this Court that the petitioner seeks to review the decision of the Foreign Claims Settlement Commission in her case. The petitioner has

no such purpose, because the Commission has completed its task, has no further authority to deal with the petitioner's claim and has no funds to pay her.

The reason why the Commission is made a party to this action is that it is the sole agency for enforcing Section 305 of the Foreign Claims Settlement Act of 1955 (22 U. S. C., 1641 (m) et seq.), and said section is the only basis for Government's taking of petitioner's vested property liens.

The Solicitor-General informed the Court (her brief at p. 9) that the petitioner's property was taken by order of the Federal Court in *Steingut* v. *Guaranty Trust Co.*, 58 Fed. Supp. 623. We have demonstrated in petitioner's reply brief (at p. 3) that in that action the Court did not order taking of any property by anyone, but merely denied the delivery of the property in question to Steingut as New York receiver of Russo-Asiatic Bank.

The possession of the property subject to petitioner's lien was ordered to be delivered by the Federal Court in *U. S.* v. *The Guaranty Trust Co.*, 58 F. Supp. 623, to which action the petitioner's husband was not a party. Consequently, the action did not constitute either direct or a collateral estoppel against this petitioner.

Unless the Government contends that Mr. Litvinov acting for the Soviet Union, could transfer title to the Government on vested property liens of an American citizen with regard to the property in New York, the Government has no other source of title except Section 305 of the Foreign Claims Settlement Act of 1955.

Throughout its brief, the Solicitor-General cited various appeals, decided prior to 1935 (his brief at p. 6) in the litigation between Tillman and Russo-Asiatic Bank. The Solicitor-General did not inform the Court that subsequent to these decisions, the Court of Appeals of New York held in *Issaia* v. *Russo-Asiatic Bank*, 266 N. Y. 36, that the

lawyers who appeared for the *Russo-Asiatic* bank in these cases were without authority to represent it and that legal steps taken by them were a nullity (J. A. at pp. 4, 5). Consequently, the decisions cited by the Attorney-General a the end of page 6 had become null and void, and without any legal significance.

Equally unfounded was the claim of the Solicitor-General that in *Steingut* v. *The Guaranty Trust Corp.*, 58 F. Supp. 623, Judge Rifkind held that Tillman had no attachment in effect on November 16, 1933. The question of the validity of Tillman's detachment was not involved in any manner, because Steingut, as receiver did not claim any title to the property of Russo-Asiatic, but merely possession for the purpose of administering it for the benefit of creditors of said bank including Tillman. In explaining receivers' position in the case, Judge Rifkind in *U. S.* v. *National City Bank*, 90 F. Supp. 448 said at page 450:

> "The Receivers are state created stakeholders who seek *possession*."

In making this claim, the Solicitor-General failed to state that on appeal from Judge Rifkind's decision to the U. S. Circuit Court of Appeals, Guaranty Trust Co. argued that the Government's recovery against it should be reduced by the amount of valid attachments including that of Tillman. The Government answered that no question of attachments could be raised, because no such question was pleaded or tried in the District Court, and furthermore, that the Government merely sought possession "in order to create a pool out of which American creditors against these funds might satisfy their claims." (Compare: *U. S.* v. *National City Bank*, 90 F. Supp. 448, at p. 453.)

In seeking all the Soviet funds under the Roosevelt-Litvinov agreement, the Government expressly sought mere possession for the benefit of American creditors, and not an adverse title.

The Government in moving to dismiss this complaint for lack of jurisdiction admitted all questions of fact alleged in the complaint including that "said James A. Tillman obtained a valid lien thereupon in the amount of $210,675.05" and "that the United States took over said deposits burdened with aforesaid lien to said James A. Tillman." (J. A. p. 13). The choice here is between the Solicitor-General's reliance on a dictum in *Steingut* v. *the Guaranty Trust Co.* (his brief at p. 7) and the holding of New York Supreme Court in 1953 in *Smith* v. *Russo-Asiatic Bank,* in which Steingut, as receiver, was represented by the same attorneys who appeared and participated in the trial of *Steingut* v. *Guaranty Trust Co.* In *Smith* case it was held under Section 977-b of the New York Civil Practice Act that Tillman had, in 1953, i.e., five years after the decision in *Steingut* v. *The Guaranty Trust Company* "*valid* attachment issued out of any Court in this State" and paid on said attachment to petitioner herein $10,000.00, the proportionate amount due out of the funds of the Russo-Asiatic Bank held by the receivers. Since there were junior attaching creditors interested in the fund, if Tillman did not have a valid lien, they would have received this $10,000.00 instead of the petitioner (J. A. at p. 8). In New York all attached funds constitute one fund from which attaching creditors are paid in order of their attachment writs.

The principal grounds on which the Supreme Court of New York held in 1953 that petitioner had a valid attachment lien on the funds of Russo-Asiatic Bank in New York are set forth in the Joint Appendix at pages 45-48.

We may add that even apart from New York law as to attachments, the dictum of Judge Rifkind was based on an entry of an order in the U. S. District Court by counsel for Russo-Asiatic Bank who had no authority to represent the Bank and the District Court was without jurisdiction as the case was thereafter remanded to the State Court for that reason by the Circuit Court of Appeals.

The Solicitor-General disparagingly referred to the form of petitioner's judgment as being one by default of the defendant. Before the remand of the Tillman case to the State Court, there were two jury trials in the District Court for the Eastern District of New York, both of which resulted in verdicts in favor of Tillman. The last of such trials gave Tillman a verdict of $172,566.60, and the Court denied motion for a new trial, but thereafter by order of the Circuit Court of Appeals was directed to set the proceedings in the District Court aside and remand the case to the State Court (J. A. at p. 4).

Petitioner's final unappealable judgment of the Supreme Court of New York, even if obtained by default is entitled to full constitutional protection (*Morris* v. *Jones*, 329 U. S. 545; *Treinies* v. *Sunshine Mining Corp.*, 308 U. S. 66; *Riehli* v. *Margolies*, 279 U. S. 218.)

The Solicitor-General also cited Section 305 (7-e) of the International Claims Settlement Act of 1949 (64 stat. 12) to the effect that any person filing claim under the Act "consented to all provisions".

The petitioner was compelled to file her claim with the Commission under the well-known rule that before anyone may invoke judicial intervention, he must exhaust his administrative remedies. It is settled law that mere participation in proceedings under such an Act is not a waiver. There must be acquiescence (*Ohio Bell Telephone Corp.* v. *Public Utilities Commission of Ohio*, 301 U. S. 302). Here, the petitioner, in all her proceedings before the Foreign Claims Settlement Commission expressly relied on her constitutional rights and claimed that both the provisions of Section 305 of the Foreign Claims Settlement Act of 1955 and the acts of the Commission thereunder with regard to the petitioner's property were violations of the Federal Constitution. Besides, where a party filing under a statute providing for automatic consent receives no benefit under it and disputes its application to the

claims, there is no consent (*Buck* v. *Kuykendall, Director of Public Works of the State of Washington*, 267 U. S. 307, 317; *Arizona* v. *Copper Queen Mining Corp.*, 233 U. S. 87, 94.)

Petitioner's property was taken without ever affording her an opportunity to defend it in Court on the merits. The only justification for such a result offered by the Solicitor-General is *Steingut* v. *Guaranty Trust Co.*, 58 Fed. Supp. 623 (his brief at p. 9), the case in which United States was not a party and in which judgment did not dispose of any property.

The Government moved in the District Court to dismiss the case for lack of jurisdiction (J. A. 49). It then moved in the Court of Appeals to dismiss petitioner's appeal for "lack of meritorious issue" (Pet. App. 29). The Court of Appeals did not decide the question of jurisdiction of the District Court but summarily affirmed the dismissal citing cases seeking to review on the merits the decisions for the Foreign Claim Settlement Commission on other than the constitutional grounds, with the exception of *First National City Bank* v. *Gillilland et als.*, 257 F. 2d 233, in which an attachment lien belonging originally to the British subject was involved and although constitutional questions were raised, they were not open to the plaintiff because neither the Roosevelt-Litvinov agreement nor the Foreign Claims Settlement Act of 1955 covered British subects.

While Congress may change contractual rights, it has no power to abrogate vested property liens (*In Re Lowman*, 79 Fed. (2d) 887, 890).

In *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, the plaintiff was deprived of property by the State of Missouri by shrewd summary applications in the State Court without being afforded a trial on the merits. In reversing the

judgment of the Missouri Court, this Court said at page 678:

> "This court granted certiorari, 280 U. S. 550. We are of the opinion that the judgment of the Supreme Court of Missouri must be reversed, because it denied to the plaintiff due process of law—using that term in its primary sense of an opportunity to be heard and to defend its substantive right.
>
> *First:* It is plain that the practical effect of the judgment of the Missouri court is to deprive the plaintiff of property without affording it at any time an opportunity to be heard in its defense."

In *Louisville Joint Stock Land Bank* v. *Rockford*, 295 U. S. 555, 601, this Court expressly held that the Congress has no power to take property from one creditor and transfer it to another creditor without compensation. This is precisely what Section 305 of the Foreign Claims Settlement Act of 1955 accomplished in this case: (Pet. App., p. 25). The Solicitor-General conceded, as he was obliged to do by decisions of this Court, that the Foreign Claims Settlement Division had to give full faith and credit to the judgment of the New York Supreme Court (Compare: *Chicago & Southern Airlines, Inc.* v. *Waterman Steamship Corp.*, 333 U. S. 103, 113), and yet contended that the Commission could reduce the amount of petitioner's attachment lien fixed by the judgment of New York Supreme Court on the ground that Congress imposed a duty upon the Commission to allow only so much of such lien fixed by said judgment as was based on underlying claims originally owned only by American citizens.

The Solicitor-General frankly concedes that the purpose of this provision was to cut down the amount of the claims (his brief at p. 6, Note 2). In other words, the claim is that by introducing a new or additional issue not considered by the Court in arriving at a judgment, the judg-

ment itself may be altered, amended or revised by an agency at the Executive Department of the Government.

In *Lakelands v. Chippewa and Flambeau Improvement Co.*, 295 N. W. 919, 237 Wis. 326, the Supreme Court of Wisconsin adjudged the amount of land covered by a Federal grant registered in the U. S. Land Office. Thereafter, the defeated party asked the Land Office to resurvey the land subject to the grant. On such resurvey the U. S. Land Office eliminated about twenty (20) acres. The Court held that the resurvey was a nullity insofar as it sought to change the amount of land awarded by the judgment of the Missouri Court on the ground that its judgment could not be interfered with in any manner by any agency of the Executive Government, whether Federal or State.

In *Pacific Greyhound Mines v. Brooks*, 70 Ariz. 339, 220 P. (2), 477-479, an Arizona Court by a judgment fixed the route of a bus company. The decision was based on three permits of the State Highway Commission. There after one of the parties to the judgment attempted to run a bus on a route forbidden to it on the ground that it held another permit which was not produced in the action. The Supreme Court of Arizona held that this additional permit of the State Highway Commission could have no effect in altering or revising the judgment of the Court, because it constituted an unconstitutional interference with the judicial power by an Executive Agency.

On the same principle the attempt of Congress (if it so intended) and of the Commission to modify the amount of petitioner's liens as fixed by the judgment of the New York Supreme Court was an attempt to exercise a power denied by the Constitution to the Executive Branch of the Government with regard to the final judgments of the Judicial Branch.

Petitioner appealed from the dismissal of her complaint by the District Court on the ground that the District Court

had jurisdiction to consider petitioner's claim for compensation on account of confiscation by the Government of her vested liens (*Ginsberg* v. *Leidal*, 107 F. 2d 721), and on the ground that the full Faith and Credit clause in the Fifth Amendment and the provisions for a separation of governmental powers were violated in an attempt to vary the amount of petitioner's lien as fixed by the final judgment of the New York Supreme Court by means of an alleged right to investigate the national origin of the owners of some of the property rights assigned to Tillman. Instead of deciding whether the District Court had jurisdiction over the complaint alleging such constitutional violations, the Court of Appeals affirmed on motion, upon the apparent ground that there is no power to review on the merits violations of constitutional guarantees by the Foreign Claims Settlement Commission.

In *Cole* v. *Arkansas*, 333 U.S. 196, a person was convicted under Section 2 of an Arkansas statute. On appeal, the Supreme Court of Arkansas held the person guilty of Section 1 of the statute. In reversing this Court said, at page 201:

> "Futhermore, once Arkansas provides for an appeal to the State Supreme Court * * * the proceedings in that Court are a part of the process of law under which the petitioners' convictions must stand or fall. * * *
>
> "The convictions were for a violation of Section 2. Petitioners urged in the State Supreme Court that the evidence was insufficient to support their convictions of a violation of Sec. 2. They also raised serious objections to the validity of that section under the Fourteenth Amendment to the Federal Constitution: *None of these contentions were passed upon by the State Supreme Court.* It affirmed their convictions as though they have been tried and convicted of a violation of Sec. 1. * * *

"To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and the issues were determined in the Trial Court."

The right to an appeal and to a plenary hearing on the merits is an integral part of the Federal judicial system. The Solicitor-General refers to Rule 31-J of the Rules in the Court of Appeals which states that motions do not require oral argument. The Petitioner's claim is not with regard to the motions but with regard to the plenary appeal to which Rule 31 has no application and where Rule 19 (a) secures oral argument. Petitioner submits that if she had an oral argument in the Court of Appeals in this case, the Court would not have erred in understanding the true issues on the petitioner's appeal before it.

However, irrespective of the Rules of the District Court of Appeals, the Judicial Code in U. S. C. 28, Chapter 3, Section 46-C specifically requires that the Federal Court of Appeals shall *"hear"* the appeals before it.

In *Ochoa* v. *Hernandez*, 230 U. S. 139, this Court said, at page 141:

"Due process 'inhibits the taxing of one man's property and giving it to another, *contrary to settled usages and modes of procedure*, and without notice or an opportunity for a hearing'."

In *Dowd* v. *U. S.*, 340 U. S. 206, where the Court denied the hearing of appeal on the merits and disposed of it on a motion, this Court, in reversing, said:

"But we find no indication that such appeals will ever be heard *as of right* • • • nothing short of an actual appellate determination of *the merits* of the conviction—*according to the procedure prevailing in*

ordinary cases—would cure the original denial of equal protection of law."

In *Griffin* v. *Illinois*, 351 U. S. 12, this Court said, at pages 18 and 20:

> "Appellate review has now become an integral part of the Illinois trial system * * *. Consequently at all stages of the proceedings the due process and Equal Protection Clauses protect persons like petitioners from insidious discriminations. * * *
>
> * * * The right to an appeal * * * is fundamental to the protection of life and liberty and therefore a necessary ingredient in due process of law. * * *"

In holding that it has the power to dismiss a plenary appeal on the merits without argument and without the reply brief of the appellant, the Court of Appeals failed to follow the decision of this Court in *Sparrow* v. *Strong*, 70 U. S. 49-50 in which it held that the motions to dismiss are limited to the lack of jurisdiction and the regularity of the appeal, and a further decision of this Court in *Amory* v. *Amory*, 91 U. S. 356, where it held that the merits of an appeal could not be disposed of by a motion to dismiss.

The decision of the Court of Appeals in this case was in direct conflict with the decisions of the Circuit Court of Appeals for the Fifth Circuit in *Seeman* v. *U. S.*, 40 Fed. 2d 88 and for the Third in *U. S.* v. *Nudelman*, 207 F. (2d) 109. On this branch of the petitioner's application, she has brought herself squarely within Rule 19 of this Court which provides that a writ of certiorari should be granted.

> "Where a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter; * * * or has decided a Federal question in a way in conflict with applicable de-

> cisions of this Court; or has so far departed from the accepted and usual course of judicial proceedings. * * *"

The vested liens of your petitioner in the funds of the Russo-Asiatic Bank were the only asset left by her husband to her and to her children. The courts below denied to your petitioner the consideration on the merits of her right to said liens for alleged lack of jurisdiction. Due process requires that property rights be adjudicated on the merits. Appeals cannot be disposed of on the merits without an argument and a reply brief prescribed by statute and by settled due course of judicial appellate proceedings.

Least of all private property cannot be confiscated without compensation and for distribution to other citizens selected by the Government. Your petitioner appreciates that this Honorable Court has nationally important questions before it for its decision. Yet it is also the proper guardian of the constitutional guarantees of the personal and property rights of a rank citizen. Recently, Professor Charles L. Black of Yale University discussed judicial review by this Honorable Court in a democracy in his book just published "The People and the Court", and, thus stated his conclusions as to said guarantees:

> "They inscribe our highest political ideas. What they mean is what we as people mean. If we construe them liberally and creatively, employing the skills of legal reasoning to give them body and life, bringing the resources of legal technique to bear to make them apply to new problems as well as to old, then we have a right to make speeches about our sacred generalities without deserving a ripe tomato in the face from the gallery of history.
>
> If we construe them away, laughing behind our sleeves at the 'perfectly legal' legerdemain with which the

trick has been managed, we construe away the dignity and worth of our nation."

WHEREFORE, your petitioner respectfully prays that her petition for reconsideration be granted and that upon such reconsideration a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit.

LENA S. TILLMAN,
Petitioner.

Respectfully submitted,

JOHN WATTAWA
and
BORRIS M. KOMAR,
Counsel for Petitioner.

Verification

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

LENA S. TILLMAN, being duly sworn, deposes and says: That she is the above named petitioner. That she has read the foregoing petition and that the statements therein are true to her own knowledge.

LENA S. TILLMAN.

Sworn to before me this
21st day of March, 1960.

WILLIAM H. LEFKOWITZ,
Notary Public,
State of New York.
Qualified in New York County.
#31-7475-200.
Comm. expires March 30, 1961.

(NOTARIAL SEAL)

Certificate of Counsel

WE, the counsel for the above petitioner hereby certify that the within Petition for Reconsideration of the denial of petition for writ of certiorari to the petitioner is presented in good faith and not for delay, and is restricted to the grounds specified in Rule 58, Subdivision 2 of this Court.

Dated: New York, N. Y., March 21, 1960.

JOHN WATTAWA.

BORRIS M. KOMAR.